**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

DANIEL KEMP,

Plaintiff-Appellant,

vs.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, a Michigan corporation,

Defendant-Appellee.

Supreme Court No. 151719
Court of Appeals Case No. 319796
Wayne County Circuit Court
Case No. 13-008264- NF

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# SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT DANIEL KEMP

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the plaintiff's injury is closely related to the transportational function of his motor vehicle, and thus whether the plaintiff's injury arose out of the ownership, operation or maintenance, or use of his motor vehicle as a motor vehicle.

2. Whether the plaintiff's injury had a causal relationship to his parked motor vehicle that is more than incidental, fortuitous or but for.

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## I.

## PLAINTIFF'S INJURY IS CLOSELY RELATED TO THE TRANSPORTATIONAL FUNCTION OF HIS MOTOR VEHICLE, AND THUS HIS INJURY AROSE OUT OF THE USE OF HIS MOTOR VEHICLE AS A MOTOR VEHICLE

This court asked the parties to address:

> (1) whether the plaintiff's injury is closely related to the transportational function of his motor vehicle, and thus whether the plaintiff's injury arose out of the ownership, operation or maintenance, or use of his motor vehicle as a motor vehicle...

The answer requires a review of how the accident happened.

### A. FACTS

Daniel Kemp was injured unloading from his truck items he had just transported from his workplace:

> ....I returned home from work, in which I am an employee for YRC Freight.... my profession is a Truck Driver and I drive out of town on overnight runs. On this day 9/15/12 while unloading my personal items of overnight bags, lunch cooler and briefcase in my driveway, I reached in my vehicle behind the driver's seat.... and tore my right calf muscle in several places. I heard a loud bang and my right calf immediately bruised and swelled and I fell down half in my vehicle. (Exhibit 1 to this brief)[1]

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[1] From defendant's Exhibit 15 to plaintiff's deposition, identified as "Description of Incident...". The document is also in defendant's claim file, produced in "Defendant's Answers to Plaintiff's First Requests for Admission, Answers to Plaintiff's Interrogatories and Requests for Production to Defendant," filed with the Circuit Court

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Q How long had you been home before you started unloading your car?

A 30 seconds. As soon as I got out I started to unload.

Q Okay. And then what?

A I reached in because I had my briefcase from work. I had an overnight bag and I had my lunch pail. I carry my lunch pail.....behind the console is where ...my overnight bag and my lunch box is. Just past, just the other side of my briefcase. I reach in and as I was picking up the objects I heard something go pow and I fell to the ground. (Exhibit 2 to this brief[2])

****

A I had one hand against the seat. I leaned in the vehicle, picked up my items, brought them outside as I twisted to set them down. That's when I heard bang [from his right calf], stuff fell to the ground, I fell in the truck. (Dep 34, in Exhibit 3 to this brief)

Q So as you reached it, was it your intent to pick up all of these things together and lift them out of the vehicle in one motion?

A My intent was to pick those up, lower them down to the ground, finish unloading my vehicle, close the vehicle, lock it. (Dep 39)

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on 9/17/2013.

[2] From pages 5 and 6 of statement given to Claim Representative Jodi Treat, produced in "Defendant's Answers to Plaintiff's First Requests for Admission, Answers to Plaintiff's Interrogatories and Requests for Production to Defendant," filed with the Circuit Court on 9/17/2013, and identified by defendant on page33 of plaintiff's deposition.

> Q Could you describe again...the sequence of action that took place as you reached into the vehicle to the point where you experienced the pain in your leg?
>
> A I had my left hand on the back seat of the seat, the head rest.... I reached in and grabbed my brief case, the thermos and the overnight bag.... Lifted them up, brought 'em over the top of case of beer [in back seat of truck]. As I turned to lower them into the ground, that's when I heard the bang. (Dep 40-41)
>
> Mr. Lasser: You were motioning lowering.
>
> Mr. Kemp: Right.... That's what I said. Twisting, lowering them to the ground. (Dep 41-42)
>
> Q Had you actually put them [the three items] on the ground when you experienced this first sign of something being wrong with the lower part of your body?
>
> A No, sir.
>
> A .....-what I mean is when I turned to the right, as I was lowering them to the ground, then's when I heard the bang [from calf muscle]. And it was loud, very loud. And I just fell and I was still holding onto the seat. And when I fell, I twisted into the truck. So I guess I was turning to the right, as you say, lowering them to the ground. They weren't to the ground yet because they fell all over the place in my driveway. (Dep 54)

A photograph, Exhibit 4, reproduces the position of Mr. Kemp at the instant of injury, as he was unloading his property.[3]

To summarize: Mr. Kemp drove his truck home from work and parked in his

[3] Per Mr. Kemp's testimony at pg 44 of his deposition; the photo is Exhibit 3 to the deposition.

driveway, got out, opened a rear door, stood on tip toes so he could lean far into the back seat, and with his right hand picked up the briefcase, lunch thermos, and overnight bag he had used at work. While unloading these items from the back seat and while in physical contact with them, he suffered injury.

**B. DISCUSSION**

These facts rebut a central mis-statement of fact by the Court of Appeals majority: the truck was merely "...used as a storage space for his personal items" (Opinion 3). There is no evidence Kemp used the back seat as merely a "storage space for his personal items". The Court of Appeals majority cited none.

Kemp did not store items in his back seat such as one might store cases of soda inside a van when there is no storage room left in one's house, or one might store items in a vehicle permanently parked in a backyard when it is no longer useable for transportation. Kemp was not using his truck as a storage shed, he was using it to transport himself and his belongings home from work.

MCL 500.3105 makes no fault benefits payable only if an injury arises from the use of a motor vehicle "as a motor vehicle." *McKenzie v Auto Club Ins Asn,* 458 Mich 214, 216-217 (1998). In *McKenzie* this court held that asphyxiation occurring when a person slept in his vehicle does not arise from the use of a motor vehicle "as a motor vehicle," because it was not "being used for transportational purposes," id,

219. This court gave several examples to illustrate the term "transportational purposes":

> While it is easily understood from all our experiences that most often a vehicle is used "as a motor vehicle," i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purpose, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum. On those occasions, the use of the motor vehicle would not be "as a motor vehicle," but as a housing facility, advertising display, construction equipment base, public library, or museum display, as it were. It seems then that when we are applying the statue, the phrase "as a motor vehicle" invites us to determine if the vehicle is being used for transportational purposes.

*McKenzie*, 458 Mich 214, 216-217.

This court added, "Of course, as §3106 indicates, a vehicle need not be moving at the time of an injury for the injury to arise out of the use of a motor vehicle as a motor vehicle, i.e., out of its transportational function. See, e.g, *Putkamer [v Transamerica Ins Corp of America,* 454 Mich 626 (1997)], n1 supra, 454 Mich at 636-637]...." *McKenzie*, id, n1, 458 Mich 214, 216.

This language applies here: Kemp's truck was not moving when he was hurt, but his injury arose from his transportational use of the truck because it happened while he was unloading items he had just used at work and which he had just driven home from work.

If Kemp had just driven to the airport for a trip to Florida and had herniated a disc in his back lifting a suitcase from the trunk of his car, he would be entitled to benefits. In that scenario and the scenario in this case, the injury arises from unloading items the driver had just transported in his vehicle. The plain language of the statute provides benefits.

Kemp's injury is compensable under both §§3105 and 3106(1)(b). His injury fits within these sections because it occurred while he was "in personal contact with property" he was unloading from his truck which he had just transported.

The dissent in this case correctly said:

> ....And, contrary to defendant's suggestions, the injuries arose out of the operation or use of the parked vehicle in its transportational function. Indeed, it is axiomatic that when one travels in a vehicle, one will take personal effects along for the ride and will seek to unload these personal effects when the drive is finished. Here, plaintiff alleged that, in the process of unloading his personal effects from the vehicle, he sustained injuries. This is precisely within the second step of the *Putkamer* [*v Transamerica Insurance Corporation of America*, 454 Mich 626, 563 NW2d 683 (1997)] and within the plain language of MCL 500.3106(1)(b).

The dissent neatly summed it up: "I can imagine no scenario better than this one to exemplify what it means to injure onself as a direct result of 'property being... lowered from the vehicle in the... unloading process'". (Page 7)

The decisions of the trial court and the Court of Appeals should be reversed.

## II.

**PLAINTIFF'S INJURY HAD A CAUSAL RELATIONSHIP TO THE VEHICLE THAT IS MORE THAN INCIDENTAL, FORTUITOUS, OR BUT FOR.**

This court asked the parties to address:

> (2) whether the plaintiff's injury had a causal relationship to his parked motor vehicle that is more than incidental, fortuitous or but for.

Dr. Surinder Kaura treated Kemp for injuries he suffered while unloading his truck. Dr. Kaura in an Affidavit submitted to the trial court in opposition to the motion for summary disposition that Kemp's injuries arose from the unloading of his property, and were not incidental to the unloading process (Exhibit 5):

> 2. He has read the deposition testimony of Daniel Kemp, in which Mr. Kemp states that on Sept. 15, 2012, he injured a calf muscle and his low back while leaning into the cab of his pickup truck; that he lifted out of the cab several items, twisted his back as he lowered the items to the ground, and felt and heard a pop in the calf.
>
> 3. I have treated Mr. Kemp since October 2012, for injuries sustained in that incident.
>
> 4. It is my opinion that his calf and low back injuries arose out of the process of unloading the items as Mr. Kemp described, and were not merely incidental to the unloading process.

Kemp's testimony alone, even without Dr. Kaura's Affidavit, provides facts from which a jury could conclude the injury had a causal relationship to his parked motor vehicle that was more than incidental, fortuitous, or but for. Kemp testified

the injury occurred as he stood on tip toes, leaning in with right arm extended, lifting his items and twisting his body to get them out of the truck. "My feet weren't flat on the ground, from leaning in. I was up on the top of my feet...." (Dep 42) "...I turned to the right, as I was lowering them to the ground, then's when I heard the bang...." (Dep 54) This testimony provides proof of a *direct* causal connection between the unloading and the injury.

When a trial court decides a motion brought under MCR 2.116(C)(10), the facts must be viewed in the light most favorable to the non-moving party, *Lafontaine Salaine Inc v Chrysler LLC*, 496 Mich 26, 334 (2014). Under this standard, when Dr. Kaura's Affidavit plus Kemp's testimony is viewed in the light most favorable to plaintiff, a trial court could not hold as a matter of law that Kemp's injuries had a causal relationship to his parked motor vehicle use that was merely from incidental, fortuitous, or but for.

The dissent correctly said:

> Here, given plaintiff's contention that he tore his calf muscle and injured his back as a direct result of lowering property from his vehicle in the process of unloading it, and viewing the evidence in the light most favorable to him, statutory coverage fits squarely within the provisions of MCL 500.3106(1)(b).

Nay, more. Because plaintiff's testimony and Kaura's Affidavit were unopposed, plaintiff was entitled under MCR 2.116(I)(1 or 2) to judgment that:

(1) his injuries had a causal relationship to his parked motor vehicle that was more than incidental, fortuitous, or but for; and

(2) his injuries were closely related to the transportational function of his vehicle, so that his injuries arose out of the use of his motor vehicle as a motor vehicle.

## RELIEF REQUESTED

Plaintiff requests this court to vacate the decisions of the Court of Appeals and the trial court, and to hold that as a matter of law plaintiff's injuries arose out of the transportational use of his truck and were not merely incidental, fortuitous or but for his use of his truck, thus entitling him to no fault benefits under MCL 500.3105 and 3106(1)(b), with extent of damages to be determined by the trial court.

Respectfully Submitted,

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Dated: March 8, 2016

## CERTIFICATE OF SERVICE

Kathy S. Maretti, being first duly sworn, hereby states that on the 8th day of March, 2016, I electronically filed the following pleadings: Supplemental Brief of Plaintiff-Appellant Daniel Kemp and this Certificate of Service, with the Clerk of the Court using the True Filing System, which will automatically serve all counsel of record.

/s/ Kathy S. Maretti
Kathy S. Maretti

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